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September 1, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0383

This Decision concerns the eligibility of XXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual is eligible for an access authorization. As discussed below, I find that access authorization should not be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The notification letter cited concerns related to the fact that the individual has parents and siblings who are citizens of a foreign country whose interest are inimical to those of the United States (hereinafter "sensitive country") and who continue to reside there. The individual has ongoing contact with these family members and

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

has returned to that sensitive country to visit them. According to the notification letter, this represents a security concern under 10 C.F.R. § 710.8(e)(Criterion E). Criterion E provides that derogatory information includes information that the individual has "Parent(s), brother(s), sister(s), spouse, or offspring residing in a nation whose interests may be inimical to the interests of the United States."

The Notification Letter also states there is a security concern under 10 C.F.R. § 710.8(1), which refers to circumstances indicating that an individual may be subject to pressure or coercion.² Specifically, the letter notes the following as concerns: (i) during a 1989 interrogation by the government of the sensitive country, the individual may have indicated loyalty to that government and approval of its ruling party; (ii) the individual's wife is a citizen of the sensitive country and resides in the U.S. as a resident alien; (iii) the individual was aware of but failed to report some improper accounting by his former government contractor employer; (iv) the individual maintains a passport from the sensitive country; (v) the individual and his siblings have worked for the government of the sensitive country, and therefore may have conflicting allegiances.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his wife, several supervisors and co-workers, both current and former, and two neighbors. The DOE Counsel presented the testimony of a security specialist.

2/ Criterion L pertains to unusual conduct or circumstances that tend to show an individual is not honest, reliable or trustworthy, or that furnish reason to believe he may be subject to pressure, coercion, exploitation or duress, which may cause him to act contrary to the best interests of the national security.

II. Hearing Testimony

A. Security Specialist

The security specialist described the nature of the security concern associated with Criterion E. He indicated that this criterion "speaks to an individual's potential susceptibility to pressure, coercion or duress, particularly in the context of an individual's family members, relatives, [and] feelings of affection for those individuals living in countries. . . deemed sensitive and [which] have unfriendly aspirations towards our national security or our country." Tr. at 124. The security specialist stated that the sensitive country has "aims not consistent with the aims of our government, our country." Tr. at 127. In this regard, the security specialist pointed out that the individual identified a number of family members, including his parents and siblings, still residing in the sensitive country. According to the security specialist, the individual stated that he visits these family members and has affection for them. The security specialist noted that the individual also travels to the sensitive country for professional conferences. He testified that DOE records show that the individual traveled to that country as recently as April 2006 to visit his ailing father. Tr. at 124-27. DOE Exh. 12. The security specialist further testified that since the individual has family members who reside in the sensitive country, they are possibly susceptible to pressure and coercion. Through them, undue influence could then be exerted upon the individual. The security specialist expressed a concern as to what the individual would do if his relatives were put under pressure, and as to what actions he would take on behalf of his relatives if they were subjected to "human rights violations." Tr. at 127-28. The security specialist testified that in his view there will continue to be a security concern as long as the individual has close family members living in the sensitive country. Tr. at 129.

The security specialist believed that the fact that the individual's parents were required to perform forced labor in the 1960s, and the fact that the individual was interrogated in 1989 by officials of the sensitive country and was "forced" to profess his allegiance to that country constitute further evidence that he might be subject to coercion. Tr. at 144-55, 186. The security specialist testified that this gave rise to a similar concern under Criterion L, which also refers to susceptibility to pressure or coercion.

The security specialist also testified that the following matters involving the individual or which the individual was aware of raise Criterion L concerns: over-billing and money laundering by his former U.S. government contractor employer (Tr. at 136, 176); hosting a guest speaker at work who is a native of the sensitive country (Tr. at 140)³; his wife holds a passport from the sensitive country (Tr. at 140).

B. The Individual

The individual arrived in the U.S. in 1992. He indicated that he has been a U.S. citizen since 2000. He intends to live in the U.S. permanently. Tr. at 241-42, 243. He testified that his only allegiance is to the U.S. and that he loves this country. Tr. at 233, 236.

The individual stated that his elderly parents and several brothers and sisters still live in the sensitive country. Tr. at 232. He loves his parents, but cares somewhat less for his siblings. Tr. at 253-54. He speaks to his parents about once a month. Tr. at 247. He has made three trips to the sensitive country since coming to live in the U.S.: October 1-10, 1998, for a professional conference; December 1-10, 2001, to visit family; and April 5-25, 2006, to care for his father. He stated that he gave proper debriefings before and after those trips and spoke to no government officials of the sensitive country. Tr. at 230-31.

Addressing the Criterion E concern, the individual stated that his parents who still live in the sensitive country will not be subject to pressure or coercion because they are elderly and have nothing to do with the government. Tr. at 234, 255. Similarly, he does not fear that "something could happen" to his siblings. Tr. at 232. Nevertheless, he stated that if such a situation came to pass he would report it "to my supervisor and my management" and get "further instruction." Tr. at 257.

The individual also addressed the Criterion L concerns. With respect to his sponsorship of the speaker who is from the sensitive country, the individual stated that he had never met this person prior to the speaking event and that he has no ongoing contact with this person. Tr. at 280-81. He indicated that he did not invite the speaker. Rather, a request to host

3/ This issue was raised by the DOE subsequent to the issuance of the notification letter. DOE Exh. 13.

the speaker came to the individual's work group in the form of a general request from a local university. Tr. at 227. He stated that he was encouraged by his supervisor to host this speaker, and it was processed through official channels. Tr. at 227-28.

The individual also testified about whether he was aware that his former government contractor employer had improperly failed to provide him with the appropriate number of assistants. In this regard, the individual stated that he had requested two or three assistants, but only received one. However, he stated that he did not know what was in the final version of the proposal that his former employer sent forth, and has no knowledge of what he was entitled to under his former employer's contract with the U.S. government, because he never saw a final version of the proposal. Tr. at 271-74.

The individual also addressed the concern raised in the notification letter regarding whether he had reported over-billing by a former government contractor employer. In this regard, the individual stated that he was terminated from a position with that contractor and once he was no longer on the job, there was no longer any employee qualified to perform the research specified in the project. According to the individual, the contractor continued to use contract funds, but for personal business. The individual testified that he did disclose what he knew about this matter to his supervisor in an email. Tr. at 248-49. ⁴

C. Co-workers and Supervisors.

The individual presented the testimony of seven former and current co-workers and supervisors. For the most part these witnesses had known the individual for several years. Tr. at 10, 27, 70, 78, 114. Their contacts with the individual ranged from several times a month to several times a week. Tr. at 10, 47, 70, 79, 81, 95, 117. They testified that the individual is a hard worker and a fine employee. Tr. at 11, 28, 47, 99. They also believed the individual is honest and a loyal American. Tr. at 12, 27, 29, 69, 76-77, 79, 96.

⁴/ The individual submitted a copy of that email. Individual's submission of August 2, 2006.

D. Neighbors

The individual presented the testimony of two neighbors. These witnesses have known the individual for about four years. Tr. at 33, 85. They do not socialize frequently with the individual, but do speak to him from time to time. Tr. at 37, 38, 90. They both believed that the individual is a man of great integrity and honesty. Tr. at 34, 87.

E. Wife ⁵

The individual's wife, currently a citizen of the sensitive country, testified that she has been in the U.S. since 1995. She has a "green card." Since she is not a U.S. citizen, she maintains a passport from the sensitive country and is able to travel freely to that country. Tr. at 211.

Her parents are no longer alive, and she has one sister and two brothers still living in the sensitive country. Tr. at 212. She has affection for her family. Tr. at 214. She has made several trips to the sensitive country since 1998. Tr. at 199, 202. Her most recent trip took place in January through April 2006. She traveled to that country in order to visit and care for her husband's father who is ill. She stayed with her sister during that time. Tr. at 199-201. She indicated that she would travel to the sensitive country upon the death of her husband's parents. Tr. at 217.

The individual's wife stated that her husband speaks to his parents about once a month. Tr. at 206. He has some college friends in that country with whom he has contact only very infrequently. Tr. at 207. The individual and his wife own no property in the sensitive country, and have no financial ties there. Tr. at 197, 216.

She testified that her husband considers the U.S. his homeland, and that he is a loyal American. He left the sensitive country for his freedom, and has no intent to move back there. Tr. at 198, 199, 215, 218.

5/ The individual's wife testified through a translator because her English is limited.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R.

§ 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (Case No. VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

The issue in this case is whether the individual has mitigated the Criteria E and L concerns set forth in the Notification Letter. As discussed below, I find that the individual has not resolved the security concerns.

Criterion E

The individual in this case impressed me very favorably. He is extremely intelligent, and a hard working, well-respected professional. He is a person with a high degree of integrity and honesty. I do not believe that he retains any sympathy for the government of his former country. I am convinced that he is a

loyal citizen of the U.S. I do not believe that he has ever improperly disclosed any sensitive information to which he now has access. I also do not believe that he would, on his own volition, improperly divulge any classified or sensitive information.

However, there is no question that he has close relatives living in the sensitive country. Consequently, there remains a concern as to what this individual would do if his parents were subjected to pressure or coercion. In this regard, the individual states that this possibility is so remote as to not rise to the level of a security concern. He maintains that his parents are so elderly that they are of no interest to the government of the sensitive country. He indicates that it is therefore highly unlikely that they would ever be arrested in order to be forced to provide information to the government. I am persuaded that this is true.

However, this does not address the entire scope of the security concern that exists here. Another type of risk arises because the sensitive foreign country is in a position to force the individual to choose between his own safety or that of family members, and U.S. security. For example, the individual might privately return to the sensitive country to assist his elderly, ill parents or to attend their funerals. He might then be arrested and imprisoned until he divulged information which the government of the sensitive country was seeking. Even if the individual remains in the U.S., the government of the sensitive country could arrest the individual's relatives who live there in order to pressure the individual into divulging classified information in exchange for their release or safety.

These types of very serious circumstances in which this individual could unfortunately find himself all involve dreadful, agonizing choices between his own safety or that of his family, and the national security of the U.S. The individual did not address these types of concerns, other than to say he would immediately inform his supervisor and other appropriate individuals if he suspected that he was being subjected to pressure or coercion. This assertion in and of itself is not sufficient to resolve the security risk. I am not convinced that the individual is in a position to give reliable assurances as to what he would do in such a situation. I am not persuaded that he would be able to disregard all personal pressures and family affection and ties, and act solely in the best interests of the U.S. in a situation of extreme pressure and coercion involving himself or loved-ones. Due to his ties with close relatives living in a sensitive country, the individual presents a greater security risk than Americans without such ties. This is so even

if the individual never returns to that country. Accordingly, he has not resolved the Criterion E concerns.

Criterion L

As indicated above, the notification letter expressed a concern regarding the fact that during a 1989 interrogation by the officials of the sensitive country, the individual gave some responses in which he indicated his loyalty to that country. The letter also cited other instances in which the individual expressed his loyalty to that sensitive country while he was still a citizen. I do not believe that the individual's responses in those interrogations in and of themselves give rise to a concern regarding his current trustworthiness and loyalty to the United States. Those responses came 16 years ago when the individual was a citizen of the sensitive country, not a citizen of the U.S. I do not see how those answers can be construed to suggest that the individual is currently disloyal to the U.S., might become so, or has conflicting allegiances. I recognize the security specialist's point that the responses could provide some additional evidence regarding the Criterion E concern, and whether the individual is able to withstand pressure and coercion. I have already addressed that issue. I do not believe, however, that the issue of the 1989 interrogation raises a separate Criterion L security concern.⁶

The notification letter pointed out that the individual and his siblings have worked for the government of the sensitive country. The letter indicated that this could suggest conflicting allegiance. As indicated above, I do not believe that there is any question about the individual's current allegiance to the government of the United States. I am convinced he is a loyal U.S. citizen, with no sympathy for the government of the sensitive country. The allegiance of his siblings to the sensitive government does not present a separate Criterion L concern here. I believe that the issue is whether the individual will be subject to pressure or coercion by the sensitive country. I do not believe that the fact that the siblings may have worked for the sensitive country's government creates any additional security risk here, beyond the Criterion E risk discussed above.

^{6/} The notification letter raises a number of similar concerns under Criterion L, all of which in my opinion raise no security concerns beyond those that are already included within Criterion E. *E.g.*, Notification Letter, Items 2(K), (Q).

The letter indicated that the individual knew that a U.S. government contractor by whom he was formerly employed had engaged in wrongdoing with respect to the government contract. The individual has submitted a copy of an email that he sent to his former supervisor at this project informing him of the wrongdoing. Individual's Submission of August 2, 2006. I am convinced that the individual took reasonable steps with respect to this matter and I see no concern regarding his trustworthiness here. I also believe the individual's testimony that he did not know how many assistants he was entitled to under his former employer's contract with the U.S. government. I therefore believe that he has resolved any Criterion L security concern associated with the fact that he only received one assistant in connection with his former employment with a government contractor.

The notification letter indicated that the individual appeared to have a valid passport issued by the sensitive foreign country. I see no concern here, such as dual loyalty or a question regarding his citizenship intentions. The record in this case includes a photo-copy of the cover of the passport showing it has been cut in the corner, signifying that it is no longer valid. Further, the expiration date on the passport is 1999, one year before the individual became a U.S. citizen.⁷ DOE Exhibit 6. I see no cause for concern regarding the existence of this passport.

I also see no security concern arising from the fact that the individual sponsored a speaker from the sensitive country. This speaker was not a person with whom the individual had any previous contact. Rather, the individual was asked by his employer to "host" this speaker. The fact that he did so does not suggest to me that the individual is prone to making improper contacts with persons from the sensitive country, or that he seeks out such relationships in order to maintain inappropriate connections.

The notification letter also pointed out that the individual's wife, who is still a citizen of the sensitive country and living in the U.S. as a resident alien, could cause the individual to be susceptible to pressure or coercion on her behalf. With respect to this issue, I do not believe that the individual has resolved the security concern. The individual's wife maintains the passport of the sensitive country and can travel there freely. She visits her own family and that of her husband during these

⁷/ The individual appears to have made the DOE aware of this passport in 2003.

trips. In fact, the individual's wife has traveled on her own to the sensitive foreign country within the last six months, and stayed with her sister. I do not believe that under ordinary circumstances the individual's wife would reveal any classified information to the government of the sensitive country. I see no reason to believe that her husband would reveal such information to her, even if he were privy to it. The concern here is of a different nature. I believe that her visits to the sensitive foreign country could result in pressure on and coercion of the individual if his wife were placed into a position of duress, such as a detainment, during one of her visits. The individual could be subjected to pressure to provide information to the government of the sensitive country in order to secure her release or safety. Again, this situation could arise even if the individual did not accompany his wife on the visit to the sensitive country, but rather remained in the U.S. Accordingly, I am not convinced that this aspect of the Criterion L concern has been resolved.

V. CONCLUSION

As indicated above, I find that the individual has not resolved the Criteria E and L concerns set out in the notification letter.

It is therefore my decision that granting this individual access authorization is not appropriate at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: September 1, 2006